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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 342

SHELDON C. VINSONHALER, A. L. CHILTON, AND LEONORE H. CHILTON, A PARTNERSHIP, D/B/A KGHI BROADCASTING SERVICE, AND THE ARKANSAS RADIO AND EQUIPMENT COMPANY, A CORPORATION (KARK BROADCASTING STATION),

Appellants,

vs.

ROY BEARD, COLLECTOR FOR THE CITY OF LITTLE ROCK, ARKANSAS

Appellee

No. 4-8881

JURISDICTIONAL STATEMENT

The appellants, Sheldon C. Vinsonhaler, et al, and Arkansas Radio and Equipment Company, in compliance with Rule 12 of the Rules of the Supreme Court of the United States, as adopted February 13, 1939, and as later amended,

hereby state the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment of the Supreme Court of Arkansas entered in the above entitled cause on May 23, 1949, upon which rehearing was denied June 27, 1949, said basis being as follows:

This case is one in which the validity of an Ordinance of the City of Little Rock, Pulaski County, State of Arkansas, to-wit: Ordinance No. 7573, of the Ordinances of the City of Little Rock, Arkansas, duly enacted on April 5, 1948, and approved and effective the same date, and now recorded in the office of the City Clerk of Little Rock, Arkansas, in Little Rock Ordinance Record Book 14, at page 230, et seq., is drawn into question by appellants upon the ground that said ordinance is repugnant to Article I, Section 8, Clause 3 of the Constitution of the United States. The final decision of the Supreme Court of Arkansas, being the court of last resort in all causes in the State of Arkansas in which a decision could be had, is in favor of the validity of the ordinance. Therefore, in accordance with the rules of the Supreme Court of the United States, the petitioners, appellants, respectfully show this Court that the case is one in which under the legislation in force when the Act of January 31, 1928, (45 Stat. L. 54) was passed, to-wit: under the Judicial Code New Title 28 U. S. C. A. Secs. 1257 (2), and 2101 (C), (superseding 28 U. S. C. A. Sec. 344), a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The Ordinance of the City of Little Rock, the validity of which is here involved is Ordinance No. 7573 of the City Council of Little Rock, Arkansas and in accordance with the decision of the United States Supreme Court in the case of *John P. King Manufacturing Company* v. *City Council of Augusta*, 1928, 277 U. S. 100, 72 L. Ed. 801, the ques-

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tion of the validity of a City Ordinance has the same force and effect as if the same were a statute of the State of Arkansas. The material provisions of Ordinance No. 7573, which are questioned by appellants-petitioners, are as follows:

ORDINANCE #7573

Section 1. The conducting or carrying on of the business of producing or generation of electro-magnetic waves within the City of Little Rock for the purpose of broadcasting by radio transmission is hereby declared to be a privilege.

Section 2. The operation of the business of intrastate radio broadcasting within the City of Little Rock is hereby declared to be a privilege; provided, however, that the provisions of this ordinance shall not apply to that portion or part of such business as may be in interstate or foreign commerce, and this ordinance shall not include business done to or from points without the State of Arkansas, nor any business done for the government of the United States, its officers or agents.

Section 3. Every person, firm, or corporation engaged in the business and/or businesses declared to be a privilege in Section 1 and/or Section 2 of this ordinance shall pay an annual license tax to the City of Little Rock for the privilege of engaging in such business and/or businesses in the sum of Two Hundred and Fifty ($250.00) Dollars.

Section 4. Every such person, firm or corporation engaging in such business and/or businesses shall pay such license tax to the City Collector of the City of Little Rock on or before the 30th day of April of each year from and after the effective date of this ordinance.

Section 5. That part of Section 1A of Ordinance 7444 of the Ordinances of the City of Little Rock which reads as follows:

"Persons Soliciting Radio Advertising, $50.00," is hereby repealed.

Section 6. The business of soliciting radio advertising within the City of Little Rock is hereby declared to be a privilege, and every person, firm or corporation engaged in such business shall pay to the City of Little Rock on or before the 30th day of April of each year a license tax in the sum of $50.00. It is the intention of this body by this section to tax only the local activity and solicitations of such persons engaged in the business of soliciting radio advertising in all of its phases, and it is not the intention of this body to place a license tax on any portion of such business as may be in interstate or foreign commerce, and shall not include business done to or from points without the State of Arkansas nor any business done for or with the government of the United States, its officers or agents.

Section 7. It is the intention of this body to tax only the intrastate operations carried on by local establishments which fall in the classifications established by this ordinance and it is not the intention of this body to impose any tax upon the interstate operations of such establishments or businesses.

Section 8. Any person, firm, or corporation failing or refusing to pay the license taxes as provided by this ordinance shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not less than $15.00 nor more than $100.00, and each day of such failure or refusal to pay such license tax shall constitute a separate offense.

Section 9 is the emergency clause, which is not here material

The date of the judgment sought to be reversed herein is May 23, 1949, and rehearing was denied June 27, 1949, and this application for appeal is presented August 6, 1949.

The nature of the case is as follows: On April 5, 1948, the City Council of the City of Little Rock, Arkansas, enacted Ordinance No. 7573, by which was levied an annual privilege tax upon all radio stations operating in the City

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of Little Rock, said tax being in the sum of $250.00. This tax is levied in the alternative: (1) upon the process or business of producing electro-magnetic waves for radio purposes; or (2) upon the business of intra-state radio broadcasting. In addition this same Ordinance levies an annual privilege tax of $50.00 per person for the privilege of soliciting radio advertising in the City of Little Rock. Immediately after the approval of this Ordinance, Radio Station KGHI and Radio Station KARK, the first a partnership and the second a corporation (domestic), both operating radio stations in the City of Little Rock, brought injunctive action in the Pulaski Chancery Court seeking to enjoin the City Collector from making further attempts to collect any tax whatsoever from them on the ground that said Ordinance was in violation of the United States Constitution, Aricle I, Section 8, Clause 3, in that said tax imposed a burden upon interstate commerce.

Trial in the Chancery Court of Pulaski County, Arkansas, resulted in a judgment in favor of Plaintiff's below (KGHI & KARK Radio Stations) and the injunctive relief was granted first in the form of a temporary injunction which was later made permanent, the Chancellor finding that said tax was repugnant to Article I, Section 8, Clause 3 of the United States Constitution as said tax constituted a burden upon interstate commerce. On appeal to the Arkansas Supreme Court the determination of the Pulaski Chancery Court was reversed said Supreme Court finding by a divided opinion that said tax did not constitute a burden on interstate commerce and hence was not repugnant to Article I, Section 8, Clause 3 of the United States Constitution. Petition for rehearing reasserting the constitutional question was denied.

It is contended that the questions involved in this appeal are substantial because the effect of the judgment of the

Supreme Court of Arkansas is to uphold an Ordinance of the City of Little Rock, Ordinance No. 7573, against an attack made on said Ordinance by appellants-petitioners on the ground that it contravenes Article I, Section 8, Clause 3 of the Constitution of the United States. By the construction placed on the Ordinance by the Supreme Court of Arkansas, the City of Little Rock is permitted to levy a privilege tax upon that portion of a business which has long been recognized in the Courts of this land as entirely and wholly interstate commerce. Thus, the effect of upholding the validity of said Ordinance is to subordinate the power of the Federal Government, as exerted by the Federal Communications Act, to the power of municipal government, and thereby place within the hands of the latter the power to destroy a valuable instrumentality of interstate commerce. The validity of said Ordinance No. 7573 has never been decided by any decision of this court or any appellate federal court to date.

The constitutional question here involved was first raised by the following statement made in the Complaint filed by Appellants-petitioners, KGHI and KARK Broadcasting Stations, in the Chancery Court of Pulaski County, on May 8, 1948:

> "Section 1 of said Ordinance, declaring the business of producing or generating electro-magnetic waves for the purpose of radio broadcasting to be a privilege and placing a tax thereon, is unconstitutional and void in that the same constitutes a burden and restraint upon Interstate Commerce in violation of the commerce clause of the Constitution of the United States.
>
> "Section 2 of said Ordinance, declaring the operation of the business of 'intrastate radio broadcasting within the City of Little Rock' to be a privilege and placing a tax thereon, is unconstitutional and void in that it is impossible to segregate interstate from intrastate radio broadcasting and all the electro-magnetic

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energy produced and transmitted by these plaintiffs is received both within and outside of the State of Arkansas at the same time. Such ordinance, therefore, constitutes a burden and restraint upon Interstate Commerce in violation of the commerce clause of the Constitution of the United States.

"Said ordinance is unconstitutional and void in that in assessing a tax upon the privilege of soliciting radio advertising has no reasonable or just relationship between the amount of business transacted within the limits of the City of Little Rock, Arkansas, and the governmental advantages and protections derived from having its place of business within the City. Were it not in the interest of subserving public convenience and necessity plaintiffs' places of business could be located outside of the city limits.

"Said ordinance is unconstitutional and void in that the tax upon the privilege of broadcasting and of soliciting radio advertising in effect imposes a license upon the right to operate a radio station since plaintiffs' only means of operating said broadcasting stations is from revenue derived from advertising. Such privilege tax, therefore, constitutes an abridgement of the right of freedom of speech in violation of the due process clause of the 14th Amendment to the Constitution of the United States and Article II, Section 6, and Article II, Section 8, of the Constitution of the State of Arkansas."

The trial court, the Chancery Court of Pulaski County, in its decree, passed upon the constitutional question as follows:

". . . that each of the plaintiffs are engaged in the business of radio broadcasting in interstate commerce, that the City of Little Rock, Arkansas, passed Ordinance No. 7573 placing a privilege tax upon the business of soliciting radio advertising, that all of the radio magnetic waves produced by plaintiffs at their respective broadcasting stations move in interstate

commerce and are subject to federal regulations, and that all of the radio advertising solicited by them or by their agents is broadcast in interstate commerce, and it is therefore,

"Considered, ordered, and decreed that the said Ordinance No. 7573 is unconstitutional insofar as the same relates to the business carried on by these plaintiffs and that it constitutes a burden and restraint upon interstate commerce, and the defendant is hereby perpetually restrained and enjoined from collecting or attempting to collect the said privilege tax."

A decree was rendered in favor of the appellant herein, the Plaintiff below On appeal to the Supreme Court of Arkansas, the court of last resort in Arkansas, that court passed upon the constitutional question with the following statement:

"We think the appellees' business is intrastate as well as interstate . . .

"Furthermore, it is only the emanations of the radio waves that are inseparable. Those are not what this ordinance endeavors to tax; instead, the tax is laid upon a course of conduct that constitutes engaging in intrastate business. A substantial part of the appellees' programs originate locally and are of purely local interest. To that extent the appellees are engaged in a local activity. Should they confine their broadcasts to programs brought in from other states there might be force to their suggestion that interstate commerce is being taxed. But as long as they conduct an essentially intrastate business as well, we see no reason why they should not bear their share of the cost of municipal advantages admittedly received . . .

"What we have said disposes also of the attack upon the tax levied upon the business of soliciting radio advertising. This activity is even more distantly removed from the interstate aspects of broadcasting, and thus its liability to local taxation is even more clearly apparent."

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The decree of the trial court was reversed and the cause dismissed.

The said Supreme Court of Arkansas, the court of last resort in all cases in the State of Arkansas, rendered its decision on May 23, 1949, in an opinion by the Honorable George Rose Smith, and reversed the judgment theretofore rendered by the Chancery Court of Pulaski County. The opinion of the Supreme Court of Arkansas has not yet been officially reported but is unofficially reported in *Beard, Collector* v. *Vinsonhaler,* Volume 90, No. 6, The (Arkansas) Law Reporter, at page 262. A copy of the opinion of the Supreme Court of Arkansas, is hereto attached, marked exhibit "A" and made a part hereof. A copy of the dissenting opinion by the Honorable J. Seab Holt is attached hereto, marked exhibit "B" and made a part hereof.

The following cases are relied upon by appellants as sustaining the jurisdiction of the Supreme Court of the United States:

Fisher's Blend Station v. *Tax Commission,* 1936, 297 U. S. 650, 80 L. ed. 956;

Puget Sound Stevedoring Co. v. *Tax Commission,* 1937, 302 U. S. 90, 82 L. ed. 68;

J. D. Adams Manufacturing Co. v. *Storen,* 1938, 304 U. S. 307, 82 L. ed. 1365;

Gwin, White & Prince v. *Henneford,* 1939, 305 U. S. 434, 83 L. ed. 272;

Joseph v. *Carter & Weekes Stevedoring Co.,* 1947, 330 U. S. 422, 91 L. ed. 993;

Sprout v. *City of South Bend,* 1928, 277 U. S. 163, 72 L. ed. 833;

Crutcher v. *Kentucky,* 141 U. S. 47, 35 L. ed. 649;

LeLoup v. *Mobile,* 127 U. S. 640, 32 L. ed. 311, 1914;

Barrett v. *New York,* 232 U. S. 14, 58 L. ed. 484, 1921;

Bowman v. *Continental Oil Co.,* 256 U. S. 642, 65 L. ed. 1139;

Cooney v. *Mountain States Telephone & Telegraph Co.*, 1935, 294 U. S. 384, 79 L. ed. 934;
Federal Radio Commission v. *Nelson Brothers Bond & Mortgage Co.*, 1938, 298 U. S. 266, 53 S. Ct. 627, 77 L. ed. 1166.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT, STATE OF ARKANSAS

No. 4-8881

Opinion Delivered May 23, 1949

ROY BEARD, Collector of the City of Little Rock, *Appellant*,

v.

SHELDON C. VINSONHALER, et al, *Appellees*

Appeal from Pulaski Chancery Court, First Division
Reversed and Dismissed.

George Rose Smith, Associate Justice

GEORGE ROSE SMITH, *J.*:

This case involves the validity of occupation taxes levied by Ordinance No. 7572 of the City of Little Rock. The appellees, a partnership owning radio station KGHI and a corporation owning station KARK, brought suit to enjoin the City Collector from enforcing the ordinance, upon the theory that the taxes are an unconstitutional burden on interstate commerce. The chancellor sustained this contention. A second contention, that the ordinance infringes the guaranty of free speech, has been abandoned.

The ordinance levies an annual occupation tax of $250 upon persons who either (*a*) carry on the business of producing or generating electro-magnetic waves for the purpose of broadcasting by radio transmission or (*b*) engage in the business of intrastate radio broadcasting. The law recites that it shall not apply to that portion of the business that may be in interstate or foreign commerce, or to business done for the government of the United States. There is levied also an annual tax of $50 upon the business of soliciting radio advertising within the city, with the same exemption of interstate, foreign and Government business.

The appellees' basic argument is that all radio broadcasting is essentially interstate commerce. The proof shows that radio waves continue to travel indefinitely, that even a comparatively weak transmitter sends its signals far

beyond the borders of its own State—though with a natural diminution in strength as the impulses are diffused over a widening circle. Station KARK has been heard in every State and in countries as distant as Australia and New Zealand. Of course such facts as these underlie the various decisions holding that radio broadcasting is at least partly interstate commerce and that in its interstate aspects it may not be burdened by State privilege taxes. See, for example, *Fisher's Blend Station, Inc.* v. *State Tax Com'n*, 297 U. S. 650, in which the court struck down a privilege tax upon gross receipts from interstate broadcasting.

The question here, however, is whether radio broadcasting also involves intrastate activity which may be subjected to local taxation. It is shown that the appellees broadcast not only national network programs, originating elsewhere and relayed to Little Rock by telephone wire, but also local programs arising in the appellees' studios. About a fourth of the appellees' income is derived from local advertisers; the rest comes from the sponsors of programs originating outside the State.

We think the appellees' business is intrastate as well as interstate. Suppose, for instance, that a candidate for mayor broadcasts an address to the city's electors or a small bakery advertises a sale of its bread. Not only do such programs originate in Little Rock, but both their intended appeal and actual effect are wholly local. Only citizens of Little Rock can vote in her elections; only neighborhood customers will act on the invitation to buy a loaf of bread. It is immaterial equally to the appellees and to their advertisers that a handful of nonresidents may listen momentarily to the broadcast before turning to a program of greater interest. Such transient eavesdropping is merely an adventitious consequence of the uncontrollable carrying power of radio waves. This ordinance taxes only the local transaction, expressly exempting these fortuitous interstate aspects.

In this respect the opinion in Postal Tel. Cable Co. v. Charleston, 153 U. S. 692, is enlightening. The city levied an annual privilege tax of $500 upon telegraph companies "for business done exclusively within the city of Charles-

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ton, and not including any business done to or from points without the State." The company argued that the tax was really upon its entire business, but the court answered this contention by pointing to the language of the ordinance. It was also urged that great injury might result to the company if various cities were allowed to tax it, but the court replied: "But this is a hardship, if such exists, that it is not within our province to redress. If business done wholly within a State is within the taxing power of the State, the courts of the United States cannot review or correct the action of the State in the exercise of that power."

In the latter respect this case is even stronger, for the possibility of multiple taxes does not exist. Little Rock alone is in a position to exact a license fee for the intrastate business done by these radio stations. This consideration was stressed in *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, wherein the court sustained a tax upon gross receipts from a trade journal that carried out-of-state advertising and went to many nonresident subscribers. From the opinion: "But there is an added reason why we think the tax is not subject to the objection which has been leveled at taxes laid upon gross receipts derived from interstate communication or transportation of goods. So far as the value contributed to appellants' New Mexico business by circulation of the magazine interstate is taxed, it cannot again be taxed elsewhere any more than the value of railroad property taxed locally. The tax is not one which in form or substance can be repeated by other states in such manner as to lay an added burden on the interstate distribution of the magazine."

Nevertheless, appellees insist that the interstate and intrastate elements of broadcasting are inseparable, so that a tax upon one is inevitably a tax upon the other. As a physical matter it is true that the electric waves cannot be divided into separate classes, but that fact is not conclusive. In *Pacific Tel. & Tel Co.* v. *Tax Com'n of Washington*, 297 U. S. 403, the court summarized its earlier cases by saying: "No decision of this Court lends support to the proposition that an occupation tax upon local business,

otherwise valid, must be held void merely because the local and interstate branches are for some reason inseparable."

Furthermore, it is only the emanations of the radio waves that are inseparable. Those are not what this ordinance endeavors to tax; instead, the tax is laid upon a course of conduct that constitutes engaging in intrastate business. A substantial part of the appellees' programs originate locally and are of purely local interest. To that extent the appellees are engaged in a local enterprise readily separable from their interstate activity. Should they confine their broadcasts to programs brought in from other states there might be force to their suggestion that interstate commerce is being taxed. But as long as they conduct an essentially intrastate business as well, we see no reason why they should not bear their share of the cost of municipal advantages admittedly received. It is shown that daily newspapers pay an annual tax of $1,000, although some of their papers go beyond the State boundaries. The telephone company's tax is $45,000, though its business is interstate as well as intrastate. By comparison the appellees' tax is moderate in amount. It is not even suggested that the sum exceeds the profits derived from local business, so that interstate receipts are to some extent affected. Whether such a showing would invalidate the tax is at least doubtful, in view of the language in *Postal Tel.-Cable Co. v. Richmond*, 249 U. S. 252, and *Pacific Tel. & Tel. Co. v. Tax Com'n, supra.*

As an alternative the ordinance taxes the generation of electro-magnetic waves within the city. To the extent that this is a step in the process of broadcasting the same considerations that we have discussed are applicable. Moreover the production of these waves is even more local in its nature. It is shown that broadcasting involves a number of distinct processes. Initially, the impact of sound waves upon magnets within the microphone so affects an alternating electric current as to create electro-magnetic waves. Those who are engaged in the production of such waves are subjected to the tax. The current is next amplified and sent by wire from the studio to the transmitting station. According to one of appellees' witnesses, at

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that point "it is not radio." At the transmission station the electric impulses are again amplified, modulated, and sent forth into the atmosphere, the process then becoming radio. When the impulses are picked up by a receiving set the process is reversed and they are changed back to sound waves.

The tax may be likened to that upheld in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165. There the excise was levied in Idaho upon the generation of electricity that was immediately transmitted to Utah. No energy was kept in storage, so that when a Utah consumer turned a switch to use electricity the effect was to set in operation the generators in Idaho, which at once transformed water power into the required electrical energy. Even though generation and transmission were elements of a continuous process, the court held that they were distinct operations. The tax upon the generation of the current was accordingly upheld, in spite of its instantaneous transmission into interstate commerce.

In the case of *Fisher's Blend Station, Inc.*, v. *State Tax Com'n, supra*, strongly urged by the appellees, the court was careful not to say that a tax upon the generation of radio impulses would be invalid. This point was reserved by the following language in the opinion: "Whether the state could tax the generation of such energy, or other local activity of appellant, as distinguished from the gross income derived from its business, it is unnecessary to decide." In this case the city is venturing only into the area kept open by that decision.

What we have said disposes also of the attack upon the tax levied upon the business of soliciting radio advertising. This activity is even more distantly removed from the interstate aspects of broadcasting, and thus its liability to local taxation is even more clearly apparent.

Reversed and dismissed.

Holt, J., dissents.

APPENDIX B

SUPREME COURT OF ARKANSAS, May 23, 1949

Appeal from Pulaski Chancery Court

ROY BEARD, Collector of the City of Little Rock, Ark., *Appellant*,

v.

SHELDON C. VINSONHALER, ET AL., A PARTNERSHIP, d/b/a KGHI BROADCASTING SERVICE, ET AL., *Appellees*

J. S. Holt, Associate Justice

HOLT, *J.*, dissenting:

I respectfully dissent.

The City Ordinance ivolved here contains nine sections and provides, in effect: "(1) The business of (a) generating electro-magnetic waves for radio broadcasting purposes and/or (b) the business of intrastate radio broadcasting in Little Rock is a privilege and every person, etc., engaged therein shall pay to the City Collector an annual license fee of $250.00 beginning on or before April 30, 1948;

"(2) That the business of soliciting intrastate radio advertising in Little Rock is a privilege and every person, etc., engaged therein shall pay to the City Collector an annual license fee of $50.00 beginning on or before April 30, 1948;

"(3) Specifically declares the Council's intent not to levy the tax upon interstate radio broadcasting and/or advertising solicitation; and

"(4) Provides a penalty of from $15.00 to $100.00 per day for each day's failure to pay said tax."

The trial court found that this Ordinance constituted a burden on interstate commerce and was therefore unconstitutional.

Appellees clearly and concisely state the questions presented in this language: "1. Is the business of producing electro-magnetic waves for broadcasting purposes such a separable incident of radio broadcasting as to permit a municipal government to levy a privilege tax thereon, or is such a tax in violation of the Commerce Clause of the United States Constitution?

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"2. May a municipal government levy a privilege tax upon those persons, etc., who solicit radio advertising within the corporate limits of the city, or is the solicitation of radio advertising 'soliciting goods intended for interstate commerce' aud hence within the purview of the Commerce Clause of the United States Constitution?"

The two broadcasting stations involved here, (as are all broadcasting stations throughout the Nation) are licensed, controlled and regulated by the Federal Communications Commission.

Radio broadcasting, by its very nature, transcends State lines and is national in its scope. No method has as yet been devised by which the sound waves, which are generated and immediately transmitted through the ether, may be localized or stopped at state boundaries. It is impossible to separate intrastate from interstate since all broadcasting is interstate in scope. In this respect, radio broadcasting is entirely different from such businesses as that of telephone, telegraph and electric power companies, for obviously, you can separate, for tax purposes, gross receipts realized by telephone, telegraph or power companies done beyond the State's borders, or interstate from their intrastate business. In other words, these three latter companies could engage solely in intrastate business if they so desired, without even crossing State boundaries, but not so with radio broadcasting.

The generation of electro-magnetic waves and the transmission of those waves is, according to the evidence, practically a simultaneous operation, and neither can be singled out as a separate and distinct part and subjected to local taxation.

In the case of *Station WBT* v. *Poulnot,* (1931), 46 F. (2) 671, wherein the State of South Carolina enacted a law imposing an annual license tax upon the privilege of owning or operating a radio receiving set, the court in holding the law unconstitutional as a burden upon interstate commerce, said: "The only question remaining is whether the state has the right to lay a tax upon these instruments of inter-

state commerce. Under the numerous decisions of the Supreme Court there can be only one answer. Those decisions hold that Congress has the power to regulate interstate commerce; that that power is necessarily exclusive whenever the subjects are national in their character or admit only of one uniform system or plan of regulation; and that where the power of Congress to regulate is exclusive, the failure to regulate indicates the will that it shall be left free from any restrictions or impositions; and any regulation of the subject by a state, except in matters of local concern, is repugnant to such freedom; that no state can compel a party, individual, or corporation to pay for the privilege of engaging in interstate commerce, and that a state has no power to lay any burden in any form, by taxation or otherwise, upon interstate commerce or its instrumentali ties. * * *

"There can be no doubt that communications by radio constitute interstate commerce. It has been so held by numerous courts, and the decisions of the Supreme Court of the United States defining interstate commerce lead to that conclusion. Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. Ed. 23; Pensacola Tel Co. v. Western Union Telegraph Co., 96 U. S. 1, 24 L. Ed. 708; Blunenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U. S. 436, 40 S. Ct. 64 L. Ed. 649 U. S. 1, 24 L. Ed. 708; Western Union Telegraph Co. v. Speight, 254 U. S. 17, 41 S. Ct. 11, 65 L. Ed. 104; Whitehurst v. Grimes (D. C.) 21 F. (2) 787; Gen Elect. Co. v. Fed Radio Comm., 58 App. D. C. 386, 31 F. (2) 630; U. S. v. American Bond Co., (D. C.) 31 F. (2) 448; Tech. Radio Lab. v. Fed. Radio Comm., 59 App. D. C. 125, 36 F. (2) 111, 66 ALR 1355; Cty of N. Y. v. Fed Radio Comm. 59 App. D. C. 129, 36 F. (2) 115."

"No state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities." (*Federal Radio Comm.* v. *Nelson Bros.* 289 U. S. 266, 77 L. Ed. 1166.)

In Whitehurst v. Grimes (1927), 21 F. (2) 787, wherein a Kentucky city passed an ordinance requiring all persons operating a radio broadcasting station to pay a license tax, the court said: "The tax provided is not on the property of the radio operator, but on the business of radio broadcast-

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ing. Radio communications are all interstate. This is so though they may be intended only for intrastate transmission, and interstate transmission of such communications may be seriously affected by communications intended only for intrastate transmission. Such communications admit of and require a uniform system of regulation and control throughout the United States, and Congress has covered the field by appropriate legislation. It follows that the ordinance is void as a regulation of interstate commerce."

I think, however, that the Supreme Court of the United States, in the case of Fisher's Blend Station v. Tax Commission, (1936), 297 U. S. 650, 80 L. Ed. 956, has definitely settled all issues presented here in favor of the appellees and the case should be affirmed. This latter case came to the U. S. Supreme Court from the State of Washington. The Washington Supreme Court had held a State statute levying an occupation tax on the gross receipts from broadcasting within the State to be constitutional. The U. S. Supreme Court reversed the Washington Court and held the tax to be an unconstitutional burden on interstate commerce. I quote rather extensively from the opinion written by the late Justice Stone: "Appellant is thus engaged in the business of transmitting advertising programs from its stations in Washington to those persons in other states who 'listen in' through the use of receiving sets. In all essentials its procedure does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce. (Citing many cases.) In each, transmission is effected by means of energy manifestations produced at the point of reception in one state which are generated and controlled at the sending point in another. Whether the transmission is effected by the aid of wires, or through a perhaps less well understood medium, 'the ether,' is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of 'intercourse,' which is commerce. See Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L. ed. 23, 68.

Similarly, we perceive no basis for the distinction urged by appellee, that appellant does not own or control the

receiving mechanisms. The communications broadcasted are no less complete and effective, nor any the less effected by appellant, because it does not own or command the apparatus by which they are received. The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. See Federal Radio Commission v. Nelson Bros. Bond & Mortg. Co., 289 U. S. 266, 279, 77 L. ed. 1166, 53 S. Ct. 627, 89 A. L. R. 406."

The majority opinion appears to lean rather heavily upon the following language (which was mere dicta) used in the Fisher's Blend case: "Whether the state could tax the generation of such energy, or other local activity of appellant, * * * it is unnecessary to decide. See Atlanta v. Oglethorpe University, 179 Ga. 370, 173 S. E. 110."

It is interesting to note that the Georgia case cited in support, of the gratuitous language used, has been twice overruled since the Fisher's Blend decision. See *Atlanta* v. *Southern Broadcasting Co.* (Ga.-1937), 190 S. E. 594, and *Atlanta* v. *Atlanta Journal Co.* (Ga.-1938), 198 S. E. 788.

We also must bear in mind the well established rule that where there is any doubt as to the validity of a tax, such doubt must be resolved in favor of the taxpayer. *City of Little Rock* v. *Ark. Corp. Comm.*, 209 Ark. 18, 189 S. W. 2d. 382, and *McFeely* v. *Comm.*, 296 U. S. 102, 80 L. Ed. 83 (1935).

In view of the authorities above cited, it seems to me that there could be no doubt but that the taxes imposed here are unconstitutional.

The decree should be affirmed.

J. S. Holt,
Associate Justice.

Filed May 23, 1949.

C. R. Stevenson,
Clerk.

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